UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

James Scott, Sue Scott,
Stephen St. Louis, and
Ellen St. Louis

v. Civil No. 06-cv-286-JD
Opinion No. 2008 DNH 090

First American Title
Insurance Company

O R D E R

The plaintiffs, James and Sue Scott and Stephen and Ellen St. Louis, brought a putative class action against First American Title Insurance Company, alleging breach of the duty of good faith and fair dealing and unjust enrichment. The court denied their first motion for preliminary approval, without prejudice, because they failed to satisfy the requirements of Federal Rule of Civil Procedure 23(a) as to numerosity and typicality of Rule 23(b)(3). The parties now renew their joint motion for certification of a settlement class and for preliminary approval of their class action settlement agreement. In addition, First American filed its own supplemental memorandum in support of class certification to address the predominance requirement under Rule 23(b)(3).

Discussion

The plaintiffs' claims in this case arose from the rate they were charged by First American for title insurance when they refinanced the mortgages on their homes. The plaintiffs contend that they were entitled to a lower reissue rate because they refinanced their homes within ten years of their original mortgages and title searches but were instead charged the standard rate. The plaintiffs filed their suit as a putative class action.

The parties have reached a settlement. They jointly propose a class, for purposes of settlement, defined as:

> All owners of New Hampshire property who, during the Class Period June 30, 2003 to this Court's preliminary approval date, refinanced mortgages on such property within ten years after the date of the issuance of a prior lenders [sic] policy of title insurance insuring a mortgage covering the same property, where there was no change in ownership, and who paid a premium for a lenders [sic] policy of title insurance issued by First American in an amount in excess of the Reissue Rate.

They ask the court to certify their proposed class and to approve their settlement under Federal Rule of Civil Procedure 23(e).

As the court stated in its previous order, when the parties seek certification for purposes of a settlement, "the moment of certification requires heightened attention . . . to the justifications for binding the class members." Ortiz v.

Fibreboard Corp., 527 U.S. 815, 849 (1999). The parties must show that the proposed class satisfies the requirements of Federal Rule of Civil Procedure 23, not merely that the settlement is fair. Id.; Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621-627 (1997). "To obtain class certification, the plaintiff must establish the four elements of Rule 23(a) and one of the several elements of Rule 23(b)." Smilow v. Southwestern Bell Mobile Sys., Inc., 323 F.3d 32, 38 (1st Cir. 2003); accord In re New Motor Vehs. Canadian Export Antitrust, --- F.3d ---, 2008 WL 820922, at *10 (1st Cir. Mar. 28, 2008).

I. Rule 23(a)

Through their prior briefing, the parties have satisfied the requirements of Rule 23(a) to show common questions of law or fact and that the representatives are typical of the class. In their renewed motion, the parties address the requirements of numerosity and adequate representation.

A. Numerosity

To satisfy the numerosity requirement of Rule 23(a), the parties must show that "the class is so numerous that joinder of all members is impracticable." Berenson v. Nat'l Fin. Servs. LLC, 485 F.3d 35, 38 (1st Cir. 2007). In their initial motion

for certification and approval, the parties based their showing of numerosity on plaintiff counsel's belief and "common sense" that the number of affected consumers of mortgages from First American would be "quite high." The court found that showing to be inadequate.

In support of their renewed motion, the parties now rely on information retrieved from First American's computer systems. Based on that information, First American determined that it sold 56,233 "lenders policies of title insurance covering New Hampshire property," between June 30, 2003, and July 11, 2007. Because additional policies have been sold since July 11, 2007, the total number is growing. First American's systems cannot determine how many of the 56,233 policies sold in New Hampshire qualified for the reissue rate but were sold at the standard rate. The 56,233 policies sold between June 30, 2003, and July 11, 2007, were issued without simultaneous owner's policies, however, which suggests that the policies were for refinancing rather than initial mortgages, and the policies were not sold at the reissue rate.

The parties represent that a substantial portion of the 56,233 lender's policies issued were for refinancing. They also contend that based on a housing study conducted by Harvard University's Joint Center for Housing Studies homeowners on

average hold a mortgage before refinancing for only two years. Based on that statistic, the parties assert that most of the refinancing policies would have been issued within ten years of the original mortgage. They acknowledge that some of the policies would cover transactions that would not qualify but argue that because so few policies were sold at the reissue rate, that number would not affect the overall potential for class size.

The new information provided by the parties substantiates their claim that the putative class is likely to number in the thousands if not tens of thousands. Although numbers alone will not necessarily meet the numerosity requirement of Rule 23(a), thousands of members of a proposed class will usually satisfy that requirement. See Daffin v. Ford Motor Co., 458 F.3d 549, 552 (6th Cir. 2006); Andrews v. Bechtel Power Corp., 780 F.2d 124, 131 (1st Cir. 1985). The parties have met their burden of showing numerosity under Rule 23(a).

B. Adequacy

Rule 23(a) also requires that the class representatives be able to fairly and adequately protect the interests of the class. Berenson, 485 F.3d at 38. The purpose of the adequacy requirement is "to uncover conflicts of interest between named

parties and the class they seek to represent." Amchem, 521 U.S. at 625. The named representatives must "possess the same interest and suffer the same injury shared by all members of the class [they] represent[]." Id. (internal quotation marks omitted).

The parties failed to meet this requirement in their prior motion because, under the settlement stipulation, the two named plaintiff couples were to receive $3,000 each as representatives' fees and the court could not determine whether the settlement fund would be adequate to cover the claims of all of the class members along with the representatives' fees. If the class were too numerous to recover from the settlement fund, the named plaintiffs' right to receive representatives' fees would conflict with the interests of the class.

In their renewed motion, the parties address the award structure under their stipulation. They represent that each eligible class member, meaning those who submit valid claims, which the parties represent is likely to be only between 5% and 10% of the potential class, will receive at least fifty percent of their claimed losses. The parties also represent that the representatives' fees will not be paid from the settlement fund.

Under the stipulation, the settlement fund would initially hold $166,000, but First American would be required to provide

additional funds as necessary to compensate class members for reduced percentages of their claims if the total of the claims exceeds $166,666. As amended, however, the stipulation guarantees that First American's total liability will be capped at $330,200, which includes administrative costs of $74,200, attorneys' fees of $83,333, and $6,000 in fees to the class representatives, making the amount of the attorneys' fees and the class representatives' fees factors in the total fund available to pay claims.[1] Class representative fees, attorneys' fees, and administrative costs combined are almost 50% of First American's maximum liability. See Staton v. Boeing Co., 327 F.3d 938, 964-65 (9th Cir. 2003) (discussing potential conflict in settlement of class action involving disproportionate attorneys' fees).

The limitation on First American's liability under the settlement does not apply, however, "if the aggregate amount of all Claimant Shares is more than $333,333, [in which case] each Claimant Share shall be reduced by 50% and . . . First American

[1]The parties characterize the $330,200 amount as "the total minimum consideration for the settlement." Renewed Jt. Mot. at 14 n.3. That statement is contrary to the plain language of the amended stipulation: "First American's total maximum settlement liability will not exceed $330,200 inclusive of the settlement fund, administrative expenses, class representative fees, costs, expenses, attorneys' fees, and any other charge, as outlined below, except as provided in Section (V)(E)(4)(c) below." Ex. B, Ren. Jt. Mot., Am. Stip. (emphasis added).

shall pay that amount . . . .” Ex. B, Ren. Jt. Mot., Stip. Sections B(2) & V(E)(4)(c). The liability limitation does apply, however, to the circumstance described in Section V(E)(4)(b), which would appear to significantly change the operation of that provision, limiting the fund available for payment of claims to $166,667 and allowing a 50% payment (a payment of $100 as suggested by the parties) to only 1666 class members, which is slightly less than 3% of a potential class of 56,000 purchasers of First American policies.

As currently structured, the interests of the class representatives in receiving both representatives’ fees and recoveries for their claims, along with the amount agreed to by the parties for payment of attorneys’ fees and administrative costs, could conflict with the interests of the potential class although not necessarily with the eligible class. Therefore, the adequacy of representation depends upon the number in the class who will be eligible to receive awards under the settlement stipulation. Because that number is not now available, no determination can be made as to the adequacy of representation.

II. Rule 23(b)(3)

Certification under Rule 23(b)(3) requires that the court find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). In its prior order, the court concluded that the parties had not sufficiently addressed the requirements of Rule 23(b)(3) to permit a ruling. The parties have now filed a renewed joint motion, addressing the Rule 23(b)(3) requirements, and First American filed a separate supplemental memorandum further addressing the predominance requirement of Rule 23(b)(3).

Rule 23(b)(3) "is a joinder device for consolidating separate but similar claims." Tardiff v. Knox County, 365 F.3d 1, 4 (1st Cir. 2004). Under the Rule 23(b)(3) analysis, the court "must formulate some prediction as to how specific issues predominate in a given case." In re New Motor Vehs., 2008 WL 820922, at *11 (internal quotation marks omitted). When common questions predominate as to liability, courts will ordinarily find predominance even if individual issues concerning affirmative defenses or damages exist. Smilow, 323 F.3d at 39-40. In addition, when individual claims would be too small to

litigate separately, a class action is superior to individual litigation. Id. at 40.

In this case, the parties contend that each potential class member's claim is based on the same issue: whether the applicant for First American title insurance was eligible for the reissue rate but was charged a higher premium. The plaintiffs also argue that the potential class members share an issue as to whether First American's protocols, guidelines, and lack of oversight of its agents caused eligible applicants not to receive the reissue rate.[2] First American explains that because of the proposed settlement, individual proof issues are eliminated by the form through which potential class members would submit their claims.

As the court previously held, First American's liability to each of the class members depends upon the same issue, whether the applicant was eligible for the reissue rate but was charged a higher premium. Eligibility will be determined based on the same claim form, which simplifies the process and avoids individual

[2]An absence of any explanation of the asserted common issues arising from First American's protocols, guidelines, and oversight prevented the court from finding that common issues predominated under Rule 23(b)(3) in its first order. Surprisingly, the plaintiffs continue to argue that the class would share these issues, which appear to pertain to a negligence claim that was not pled in the plaintiffs' complaint. Given the lack of relevance, issues about First American's protocols, guidelines, and oversight of its agents are not considered for purposes of class certification.

investigations into files and records. When class certification is sought for settlement only, the court need not consider class management problems. Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 298 (1st Cir. 2000).

The potential class shares the common issue of determining First American's liability and each members eligibility for a claim, which predominate over any individual issues. Because the new issues raised by the plaintiffs about First American's protocols, guidelines, and oversight are irrelevant to the claims in this case, it is not necessary for the potential class members to share those issues nor is it necessary for common questions pertaining to those issues to predominate over individual questions. Therefore, common questions of law and fact predominate. Further, because each individual claim would be too small for potential class members to litigate separately, a class action is superior to individual litigation.

III. Certification

Because the issue of adequacy of representation remains unsettled, a class cannot be certified for settlement purposes based on the stipulation and supporting memoranda presented.

Conclusion

For the foregoing reasons, the parties' renewed joint motion (document no. 62) is denied without prejudice to file a new proposed stipulation and a joint motion for approval that satisfies the requirements of adequate representation.

SO ORDERED.

Joseph A. DiClerico, Jr.
United States District Judge

April 28, 2008

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